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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

DALE BOZZIO, individually and on behalf of all other similarly situated, Plaintiff, vs. EMI GROUP LIMITED; CAPITOL RECORDS, LLC; EMI MUSIC NORTH AMERICA, LLC; EMI RECORDED MUSIC; and EMI MARKETING, Defendants.	Case No. 4:12-cv-2421 YGR Assigned to: Hon. Yvonne Gonzalez Rogers **DEFENDANT CAPITOL RECORDS, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)** Date: Aug. 28, 2012 Time: 2:00 p.m. Place: TBD [Filed concurrently with [Proposed] Order]

TO THE CLERK OF THE NORTHERN DISTRICT OF CALIFORNIA, AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 28, 2012, at 2:00 p.m., or as soon thereafter as the matter may be heard, before the Honorable Yvonne Gonzalez Rogers in a courtroom to be designated (as set forth in the standing order) at the United States District Court, Northern District of California, located at 1301 Clay Street, Oakland, CA, 94612, Defendant Capitol Records, LLC will and hereby does move (1) to dismiss Plaintiff Dale Bozzio's first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, on the grounds that the plain terms of the contracts at issue specifically preclude Plaintiff from maintaining an action on each of the claims alleged; (2) to dismiss Plaintiff's claims pursuant to Rule 12(b)(6) to the extent they seek royalties that were reported more than three years prior to the filing of this action, on the ground that such claims are also barred by the language of the relevant agreements; and (3) to dismiss Plaintiff's claim for fraudulent business practices for failing to allege fraud with the requisite specificity under Federal Rule of Civil Procedure 9(b).

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, all pleadings and records on file in this case, and upon such evidence and argument as may be presented at or before the hearing on this Motion.

Dated: July 23, 2012

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Dale Bozzio's second attempt to bring a claim against Capitol Records, LLC fails for the same reasons she was forced to abandon her original complaint: the plain terms of the agreement between Missing Persons, Inc. and Capitol preclude her from suing Capitol for the alleged underpayment of royalties. Despite the clear and explicit language of the operative agreements, she persists in bringing the same four claims as in her original complaint, all seeking royalty payments allegedly due under a 1982 recording agreement (the "Original Agreement) that Plaintiff and the other members of Missing Persons entered into with Capitol Records, Inc., predecessor in interest to Defendant Capitol Records, LLC ("Capitol").

Plaintiff cannot maintain any of these claims because the express terms of both the Original Agreement and the 1983 Loan-Out Agreement bar the individual band members, including Plaintiff, from asserting any claim for royalties against Capitol. Instead, Plaintiff agreed to look solely to the group Missing Persons (and later, to Missing Persons, Inc.) for payment of royalties, and expressly agreed to "not assert any claim" for royalties against Capitol. First Amended Complaint ("FAC"), Ex. A, p. 34, ¶ 1.a; Ex. B, p. 6, ¶ 1.d. Plaintiff cannot now disregard the plain language of the operative agreements and assert such claims.

Additionally, the Original Agreement also contains a limitations provision stating that royalty statements will be final and binding unless Plaintiff brings a claim within three years of the issuance of each statement. Well-settled California law holds that such clauses are enforceable and bar Plaintiff from bringing suit for alleged breaches occurring more than three years before the filing of this lawsuit. Accordingly, even if Plaintiff had standing to bring this action—and she does not—the bulk of Plaintiff's claims (*i.e.*, claims based on royalty statements rendered before May 11, 2009) must be dismissed in any event.

Finally, to the extent Plaintiff's fourth cause of action alleges a violation of California's Unfair Competition Law for fraudulent business practices, Plaintiff has not alleged fraud with the specificity required by Rule 9(b). Accordingly, Plaintiff's claim for "fraudulent business practices" under the Unfair Competition Law must be dismissed in any event.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Threadbare recitals of the elements of a cause of action supported by mere conclusory statements are insufficient. *Id.* And although material facts alleged in the complaint must be construed in the plaintiff's favor, *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501 (9th Cir. 2010), the court is not required to accept as true allegations that are contradicted by documents incorporated into the complaint or are properly subject to judicial notice, *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

In a case involving the interpretation of a contract under California law, dismissal is appropriate where "the court considers the contract language and the evidence the parties have presented and concludes that the language is reasonably susceptible to only one interpretation." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1017 (9th Cir. 2012). Where the court reaches such a conclusion, it need not afford plaintiff any "additional opportunities to find or present extrinsic evidence" and may dismiss the complaint on a motion to dismiss. *Id.*

III. FACTUAL BACKGROUND

A. The Original Agreement

All of Plaintiff's claims arise out of and depend upon written contracts. The earliest of these is the Original Agreement, attached to the First Amended Complaint as Exhibit A, and is between Capitol and the members of Missing Persons, both "individually and collectively." FAC, Ex. A, p. 25, ¶ 29. The Original Agreement called for the group Missing Persons to make and deliver master recordings to Capitol; in return, Capitol agreed to make and distribute the group's records, and to pay the group certain advances and royalties. *Id.*, Ex. A, pp. 1-10, ¶¶ 1-4. With respect to the payment of royalties, the "Group Supplement" to the Original Agreement (which is paginated consecutively to, and part of, the Original Agreement) provided that Capitol would make payments in excess of union scale to "Missing Persons," and Plaintiff and the other members of Missing Persons agreed "to look solely to the partnership 'Missing Persons' for payment of all royalties and/or fees, as the case may be, and will not assert any claim in this regard against Capitol . . . ." *Id.*, Ex. A, p. 34, ¶ 1.a. Furthermore, the Original Agreement provided that "[i]f any member ceases to be a member of the Group, such member shall continue to look solely to the group partnership 'Missing Persons' for payment of all applicable royalties and/or fees in accordance with Paragraph 1.a. of this Group Supplement." *Id.*, Ex. A, p. 37, ¶ 4.

B. The "Loan Out" Agreement

On June 6, 1983, the parties agreed to amend the Original Agreement through a subsequent "Loan-Out Agreement." The Loan-Out Agreement is between Capitol and Missing Persons, Inc., a corporation wholly owned by the members of Missing Persons. FAC, Ex. B, p. 3, ¶ 7. The Loan-Out Agreement amended the Original Agreement by substituting Missing Persons, Inc. as the contracting party in place of the individual band members, FAC, ¶ 49, and Missing Persons, Inc. assumed the rights and obligations of the individual band members under the Original Agreement. Specifically, the Loan-Out Agreement included the following provisions:

- "Notwithstanding that [the Original Agreement] (including all amendments thereto) . . . is drafted and executed in the form of an agreement between Artist and Capitol, [Missing Persons, Inc.] shall furnish the services of Artist to Capitol in accordance with all of the terms and conditions of such [Original Agreement]." *Id.*, Ex. B, p. 1, ¶ 1.
- "[Missing Persons, Inc.] hereby assigns and grants to Capitol all of the rights to Artist's services and the results and proceeds thereof and all other rights which would have been granted to Capitol in the [Original Agreement] to the same extent as though this agreement had never been executed . . . ." *Id.*
- "From and after the date hereof [Missing Persons, Inc.] shall have the right and authority to execute any and all documents on behalf of Artist in accordance with the [Original Agreement] and this agreement. [Missing Persons, Inc.] and Artist shall be bound by the exercise by [Missing Persons, Inc.] of such aforesaid authorities

specified above." *Id.*[1]

- "[Missing Persons, Inc.] shall have the benefit of all agreements, representations and warranties made by Capitol to Artist in the [Original Agreement] . . . ." *Id.*, Ex. B, p. 2, ¶ 4.
- "To the extent this [Loan-Out A]greement contains terms additional to or inconsistent with the [Original Agreement], this [Loan-Out A]greement shall govern." *Id.*, Ex. B, ¶ 7.

The Loan-Out Agreement also expressly stated that Missing Persons, Inc. was to be paid "the compensation provided to be paid to Artist pursuant to all of the terms and conditions of [the Original Agreement]." FAC, Ex. B, p. 1, ¶ 2. For their part, Plaintiff and each of the other band members signed a declaration that is paginated consecutively to, and part of, the Loan-Out Agreement, and which was executed "as a further inducement for Capitol to enter into the [Loan-Out Agreement]." *Id.*, Ex. B, p. 6. That declaration states that Plaintiff and the other band members "[a]gree to look solely to [Missing Persons, Inc.] for the payment of my fees and/or royalties, as the case may be, and will not assert any claim in this regard against Capitol . . . ." *Id.*, Ex. B, p. 6, ¶ 1.d. Only in the event that Capitol sought to enforce its rights directly against an individual band member would that band member "have the right to look to Capitol" for the payment of fees or royalties. *Id.*, Ex. B, p. 7, n.*. Plaintiff has not alleged and cannot allege that Capitol has enforced or attempted to enforce any of its rights directly against her, or any other individual band member, pursuant to the terms of the Loan-Out Agreement.

C. The First Amended Complaint

After Capitol filed its motion to dismiss Plaintiff's original complaint, Plaintiff abandoned her original complaint (*see* Dkt. No. 10) and filed a First Amended Complaint (the "FAC"). Plaintiff once again alleges that she is a founding member of the group Missing Persons, and brings this action not on behalf of the group, but as an individual, and as a putative class representative. *See* FAC, ¶¶ 19-20. Plaintiff still seeks recovery for alleged underpayment of royalties in breach of

[1] In fact, every amendment to the Agreement after June 6, 1983 was signed by Missing Persons, Inc., rather than the individual band members. *See* FAC, Ex. C..

the Agreement. *Id.*, ¶¶ 142-63. Plaintiff alleges that under the Original Agreement, Capitol was required to pay a royalty to the group Missing Persons for record sales of masters created by the group, and that Capitol was also required to pay a higher royalty to the group for each license Capitol made of the group's masters. *Id.*, ¶¶ 52-59. Plaintiff claims that Capitol improperly treated the sale of the group's songs through digital content providers (*e.g.*, iTunes) as a record sale and paid the lower record sale royalty rate to the group. *Id.*, ¶¶ 3, 5-7, 137. According to Plaintiff, Capitol should have treated such sales differently for royalty purposes, because Capitol allegedly "licenses" masters to digital content providers for permanent download sales. *Id.*, ¶¶ 134-37. According to Plaintiff, this entitles her to a higher royalty rate for "licenses" under the original agreement, rather than the lower royalty rate that applies when Capitol sells the same records in physical format. *Id.*

Plaintiff's four purported causes of action all involve and are dependent upon allegations that Capitol has failed to properly pay royalties under the Original Agreement:

- Plaintiff's first cause of action for breach of contract alleges that Capitol's underpayment of royalties breached the Agreement. *See* FAC, ¶ 146.
- Plaintiff's second cause of action for declaratory judgment asks this Court to "enter a declaratory judgment determining that the pertinent recording agreements obligate [Capitol] to pay and/or credit Plaintiff . . . the percentage specified for licensing, rather than for sales . . ." FAC, ¶ 152.
- Plaintiff's third cause of action for an open book account alleges that "[Capitol] has become indebted to Plaintiff . . . on said open book accounts in amounts equal to [Capitol's] underpayment on the income [Capitol] has received . . . from its licensees for digital download, mastertone, and streaming uses." FAC, ¶ 157.
- Plaintiff's fourth cause of action for unfair competition under section 17200 of the California Business and Professions Code is based solely on Plaintiff's allegations that Capitol underpaid royalties in breach of the Agreement, and seeks restitution for the alleged underpayments. FAC, ¶¶ 158-163.

IV. ARGUMENT

A. Plaintiff Is Contractually Precluded From Asserting Her Claims.

1. The Express Language Of The Operative Agreements Bars Plaintiff's Claims.

The clear and explicit terms of both the Original Agreement and the Loan-Out Agreement affirmatively bar Plaintiff's claims for royalties against Capitol. In the Group Supplement contained in the Original Agreement, Plaintiff and the other band members expressly agreed to look solely to the group Missing Persons for payment of royalties and fees owed under the Agreement. FAC, Ex. A, p. 34, ¶ 1.a. Not only did they agree to look solely to the group for payment, but Plaintiff and the other band members expressly agreed not to make any claim against Capitol regarding payment of royalties or fees due under the Original Agreement. *Id.* Indeed, even if a member of Missing Persons ceased to be a member, as Plaintiff did in 1986, that member must still "look solely to the group partnership 'Missing Persons' for payment of all applicable royalties and/or fees. . . ." *Id.*, Ex. A, p. 37, ¶ 4.

After the band members created Missing Persons, Inc. and entered into the Loan-Out Agreement, substituting Missing Persons, Inc. for themselves as the contracting party with Capitol, they restated and re-affirmed their understanding and agreement that individual band members could not make claims against Capitol for payment of royalties. In the Loan-Out Agreement, the parties agreed that Capitol would pay Missing Persons, Inc. all compensation owed to the group and its members under the Original Agreement. *Id.*, Ex. B, pp. 1-2, ¶ 2. Accordingly, Plaintiff agreed, in a signed declaration that is part of the Loan-Out Agreement, that she would look *solely* to Missing Persons, Inc. for payment of all royalties and fees due under the Original Agreement, and that she "[would] not assert *any claim* in this regard against Capitol." *Id.*, Ex. B, p. 6, ¶ 1.d. (emphasis added).[2]

[2] The band members carved out a very narrow circumstance in which they would be able to assert a claim for payment against Capitol: only if Capitol exercised its rights, pursuant to the Loan-Out Agreement, directly against the band members, would the band members have any right to make a claim for payment under the terms of the original Agreement directly against Capitol. FAC, Ex. B, p. 6, ¶ 1.d. Plaintiff has not alleged that Capitol has exercised any of its rights under the Loan-Out Agreement directly against any band member, let alone Plaintiff.

When the language in a contract is clear and explicit, as it is here, the Court must give it effect to honor the intent of the parties. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821-22 (1990) ("[T]he mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract."); Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting . . . ."); Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."); Cal. Civ. Code § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. . . ."). Plaintiff's alleged status as a third party beneficiary does not absolve her of her obligations under the Loan-Out Agreement, and does not allow her to bring a claim expressly barred by the agreement. *See Mercury Cas. Co. v. Maloney*, 113 Cal. App. 4th 799, 803 (2003) ("[T]he third party beneficiary's rights under the contract are subject to the conditions imposed therein.").

2. Plaintiff's Efforts To Overcome The Contractual Language Precluding Her Claims Are Meritless.

In an attempt to avoid the plain language of the Loan-Out Agreement, the FAC includes numerous allegations that purport to justify the claims that Plaintiff has brought. However, the legal theories and arguments underlying each of these allegations fail as a matter of law, and cannot overcome the contractual obligation that requires Plaintiff to "look solely" to Missing Persons, Inc. for payment of "my royalties and/or fees."

a. Plaintiff's "Alternative" Interpretation Fails As A Matter Of Law.

First, Plaintiff offers an "alternative" interpretation of the agreements, contending that the provisions prohibiting Plaintiff from asserting claims against Capitol apply only "*after* Capitol Records has properly accounted for and paid royalties to" Missing Persons, Inc. FAC, ¶ 80. According to Plaintiff, the requirement to "look solely" to Missing Persons, Inc. for royalty payments is intended to limit band members only from bringing a legal action against Capitol "to referee an intramural dispute" once Capitol has paid Missing Persons, Inc. the proper amount of royalties owed. *Id.* Plaintiff alleges that the explicit language restricting her ability to bring a claim against Capitol does not apply if she merely alleges that Capitol has not paid all royalties owed to its counter-party to the contract, Missing Persons, Inc. *Id.*

Plaintiff's "interpretation" directly conflicts with the plain terms of the agreements and must be rejected. *See Brown v. Cal. Pension Adm'rs & Consultants, Inc.*, 45 Cal. App. 4th 333, 343-45 (1996) (upholding judgment sustaining demurrer where plaintiff's contractual interpretation was "inconsistent with the explicit language" of the agreements); *People ex rel. Dept. of Parks & Recreation v. West-A-Rama, Inc.*, 35 Cal. App. 3d 786, 791 (1973) ("[E]xtrinsic evidence is not admissible to give the language used in a written instrument a meaning to which it is not reasonably susceptible."). Neither the Loan-Out Agreement nor the Original Agreement contains any reference to internal disputes among band members, nor any language confining Plaintiff's agreement not to assert claims against Capitol to such internal disputes; instead, the agreements are explicit that Plaintiff "will not assert *any claim*" regarding payment of fees and royalties against Capitol. *Id.*, Ex. A, p. 6, ¶ 1.d. (emphasis added). Had the parties intended to limit the prohibition to claims relating to internal disputes among band members, the agreements could have so stated—indeed, the parties clearly understood how to carve out an exception to the prohibition, as the Loan-Out Agreement expressly provides for such an exception if Capitol elects to exercise its rights under the Agreement directly against Plaintiff. FAC, Ex. B, pp. 6-7, ¶ 1.d; *The Ratcliff Architects v. Vanir Constr. Mgmt., Inc.*, 88 Cal. App. 4th 595, 602 (2001) ("Courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.") (internal quotations omitted). But the parties did *not* otherwise limit the broad scope of the prohibition, instead using all-encompassing language barring "any claims."

In sum, Plaintiff's interpretation is in direct conflict with the explicit terms of the agreements, and would require the Court to read in a condition found nowhere in the contract – that the dispute relate to an internal dispute among band members. *See Trustees of the Southern Cal. IBEW-NECA Pension Trust Fund v. Flores*, 519 F.3d 1045, 1047-48 (9th Cir. 2008) (contract not ambiguous where one party's interpretation was premised on a condition not contained in the contract). The Court must therefore reject her newfound "interpretation." *See Bay Cities Paving &*

Grading, Inc. v. Lawyers' Mutual Ins. Co., 5 Cal. 4th 854, 868 (1993) (rejecting plaintiff's unreasonable interpretation of contract).

b. Plaintiff's Reliance On Various Provisions Of The California Civil Code Fails As A Matter Of Law.

Plaintiff next alleges that enforcement of the prohibition on claims by individual band members would violate various provisions of the California Civil Code. Each of Plaintiff's arguments in this regard likewise fail.

First, Plaintiff asserts that Section 1668 of the California Civil Code would render the agreements unenforceable. FAC, ¶ 81. Section 1668 provides, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668. The purpose of this statute is to protect those who have been fraudulently induced into entering an agreement by rendering any waiver of rights grounded upon the fraudulent misrepresentation unenforceable. *See McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 794 (2008) (citing 1 Witkin, Summary of Cal. Law (10th Ed. 2005), Contracts, § 304, p. 330). First, there are no allegations that Plaintiff was fraudulently induced into entering any agreement with Capitol; in fact, the many amendments to the agreements belie any claim that the parties were unsophisticated or that Plaintiff was otherwise duped into entering into them or acceding to their terms. *See* FAC, Ex. C.[3]

In any event, the provisions at issue do not seek to exempt Capitol from responsibility for fraud or willful injury. Rather, their effect is to limit *who* may seek to vindicate the band members' rights in the event of a dispute regarding royalties. Missing Persons, Inc., the counter-party to the agreements with Capitol, is permitted to assert claims relating to payment of fees and royalties against Capitol on behalf of the individual band members. In turn, the individual band members are free to seek recovery from Missing Persons, Inc. Thus, the relevant provisions do not function as a

[3] To the extent Plaintiff asserts, in support of her claim under Cal. Bus. & Prof. Code § 17200, that Capitol engaged in "fraudulent" activity, Plaintiff has failed to meet the heightened pleading standard of Fed. R. Civ. Proc. 9(b). *See infra*, § IV.C. Accordingly, those allegations cannot support Plaintiff's argument under Section 1668 either.

complete exemption from liability in violation of Section 1668. *See Farnham v. Superior Court*, 60 Cal. App. 4th 69, 73-74, 76-78 (1997) (Section 1668 did not prohibit contractual provision providing that plaintiff's "sole remedy" was against corporation and waiving claims against corporation's shareholders, directors, officers, and employees). Finally, section 1668 does not apply for the additional reason that a recording contract is not a contract that affects the public interest. *See Reudy v. Clear Channel Outdoors, Inc.*, 693 F. Supp. 2d 1091, 1114-18 (N.D. Cal. 2010); *see also, e.g.*, *Christakis v. Mark Burnett Productions*, No. CV 08–6864–GW (JTLx), 2009 WL 1248947, at *4 (C.D. Cal. Apr. 27, 2009) (holding that covenant not to sue contained in agreement between individual plaintiff and defendant television production companies was valid and enforceable).

Next, Plaintiff argues that the agreements violate section 1542 of the California Civil Code. FAC, ¶ 82. This argument is without merit for the simple reason that section 1542 does not apply. Section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." Cal. Civ. Code § 1542. The relevant provisions in the agreements do not constitute a "general release," because they are specific to claims relating to payment of fees and royalties, and because they do not bar recovery of royalties, but instead specify the party authorized to pursue such claims. *See Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1444 (9th Cir. 1986) (provision waiving claims related to a specific section of stock purchase agreement was not a "general release" prohibited by section 1542); *Larsen v. Johannes*, 7 Cal. App. 3d 491, 504 (1970) (mutual release not a "general release" where "it was restricted specifically to those actions or claims rooted in the contracts for architectural services"). Moreover, at the time the parties entered into the agreements, Plaintiff was not a "creditor" of Capitol, and Capitol was not a "debtor," within the meaning of Section 1542. *See Mesmer v. White*, 121 Cal. App. 2d 665, 674-75 (1953) (holding Section 1542 inapplicable where heirs entered agreement not to assert claims to decedent's property and there were no preexisting obligations between the parties because "[t]he transaction was not one between debtor and creditor, nor was the agreement a mere release of a debt"). Nor has there ever been any "settlement" between the parties that could have been "materially affected." Cal. Civ. Code § 1542.

Plaintiff also invokes Section 1641 of the California Civil Code, but that statute cannot salvage Plaintiff's unreasonable interpretation either. Section 1641 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Plaintiff asserts that the contractual bar on Plaintiff's claims against Capitol is inconsistent with paragraph 4.f of the Original Agreement, which Plaintiff alleges "contemplates lawsuits brought by individual band members against Capitol in connection with royalties." FAC, ¶ 83. But there is no conflict. As Plaintiff expressly alleges, when the Loan-Out Agreement was executed, "Missing Persons, Inc. was substituted as the contracting party with Capitol Records." FAC, ¶ 49. Accordingly, upon execution of the Loan-Out Agreement, any lawsuits "contemplate[d]" in the Original Agreement became lawsuits with Missing Persons, Inc., and not lawsuits with the individual band members. Thus, enforcing the prohibition on lawsuits by individual members is *consistent* with the "whole of [the agreements]," Cal. Civ. Code § 1641, because it gives effect to the substitution of Missing Persons, Inc. "as the contracting party with Capitol Records" in the Loan-Out Agreement, and Missing Persons, Inc.'s assumption of the benefits and obligations of the Original Agreement, FAC, ¶ 49.

c. Plaintiff's "Equitable Estoppel" Claim Fails As A Matter Of Law.

Undaunted, Plaintiff alleges that Capitol is estopped from invoking the provisions restricting her ability to bring a claim against Capitol, ostensibly because of Capitol's alleged "practice of dealing directly" with Plaintiff. FAC, ¶¶ 88-92. This contention is refuted by Plaintiff's own allegations.

Plaintiff's First Amended Complaint makes clear that Plaintiff's "direct" dealings with Capitol have been in a *representative* capacity on behalf of her music publishing company, Life After Music. *See* FAC, ¶¶ 90-91, Ex. C (signatures on behalf of Life After Music), Ex. D. Although Plaintiff signed several amendments to the Loan-Out Agreement, she did so *on behalf of* Life After Music. *See* FAC, Ex. C. Notably, Plaintiff herself was not a party to any of these amendments. *See id.* Instead, each amendment identifies Life After Music — not Plaintiff — as the party "agree[ing] to be bound." *Id.* Accordingly, the documents upon which Plaintiff relies directly contradict her claim that Capitol dealt with Plaintiff "directly" in her individual capacity. The court must therefore disregard Plaintiff's inconsistent allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Vallejo Dev. Co. v. Beck Dev. Co.*, 24 Cal. App. 4th 929, 946 (1994) ("[A]s a matter of law, allegations in a complaint must yield to contrary allegations contained in exhibits to a complaint.").

Moreover, and in any event, the royalties paid to Life After Music are not royalties owed to Plaintiff. The royalties paid to Life After Music are *publisher* royalties derived from musical compositions authored by Plaintiff and the other band members. *See* FAC, ¶¶ 90-91 (discussing "publishing income . . . payable to publishing entities" and "publisher royalty statements and payments for Missing Persons songs"), Ex. D (publisher royalty statements). Such *publishing* royalties are distinct from *artist* royalties, which derive from the master recordings central to both the Original Agreement and the Loan-Out Agreement. *See* FAC, Ex. A, p. 3, ¶ 3 ("Capitol agrees to pay me, *in connection with records manufactured from masters* recorded hereunder, a royalty at the applicable rates specified in the Payment and Royalty Schedule below." (emphasis added)).[4] In amendments to the Loan-Out Agreement, Life After Music agreed that certain advances made to Missing Persons, Inc. (and not Plaintiff individually) would be "recoupable from any and all *publishing income* of any kind . . . *payable to* . . . *Life After Music*." FAC, Ex. C, p. 2, ¶ 2 (emphasis added). Accordingly, even if Capitol had dealt "directly" with Plaintiff in connection with *publishing* income due to Life After Music (although it did not, and interacted with Plaintiff solely in her representative capacity), such actions shed no light on how Capitol and Plaintiff interacted with respect to the *recording* royalties that are the subject of the FAC. On that front, the

[4] *See also* E. Scott Johnson, *Long & Winding Road: Music Royalties*, 37-JUN Md. B.J. 33, 34 (2004) ("Earnings in the recording industry principally flow from the two copyrights — sound recording and musical composition — that coexist in recorded music. Sound recording copyrights protect the actual recorded performances and sounds on the master recordings, and derive from the performances and creative contributions made by the performers and producers of the recordings. . . . The musical compositions embodied in sound recordings are separately copyrightable and derive from the authorship of the songwriter.").

record is both clear and undisputed: it was Missing Persons, Inc., and not Plaintiff individually, that was authorized to—and did in fact—contract and interact with Capitol. *See* FAC, Ex. B, p. 1, ¶ 1; Ex. C. Capitol is therefore not estopped from enforcing Plaintiff's agreement not to assert against Capitol any claims relating to payment of royalties.

In sum, the clear and explicit language of both the Original Agreement and the Loan-Out Agreement preclude Plaintiff from asserting any claims against Capitol respecting the payment of royalties. Because all of Plaintiff's causes of action relate to the payment of royalties, and Plaintiff cannot amend around this defect in her claims, Plaintiff's complaint should be dismissed. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992) ("If contractual language is clear and explicit, it governs.") (citing Cal. Civ. Code § 1638); *see also Hervey v. Mercury Cas. Co.*, 185 Cal. App. 4th 954, 968 (2010) ("[B]ecause the [contract] is not reasonably susceptible to the meaning [Plaintiff] attributes to it, the parol evidence [Plaintiff] seeks to obtain and allege would be inadmissible to alter or vary the terms of the policy. Thus, the trial court did not abuse its discretion in denying [Plaintiff's] request for leave to amend the complaint."); *see also Skilstaf*, 669 F.3d at 1017-1018 (same).

B. Plaintiff's Claims Are Barred To The Extent They Seek Royalties Reported More Than Three Years Before The Filing Of This Lawsuit.

Even if Plaintiff could maintain an action against Capitol for underpayment of royalties, the Original Agreement requires Plaintiff to bring such a claim within three years after a royalty statement has been issued:

> I shall be foreclosed from maintaining any action, claim or proceeding against Capitol in any forum or tribunal with respect to any statement or accounting due hereunder unless such action, claim or proceeding is commenced against Capitol in a court of competent jurisdiction within three (3) years after such statement or accounting is rendered.

Compl., Ex. A, p. 9, ¶ 4.f.

Contractual limitations provisions, which limit the time period for challenging royalty statements and function as contractually agreed upon statutes of limitations, are enforceable. *See,* *e.g.*, *Clinton v. Universal Music Group*, No. CV 07–672 PSG (JWJx), 2011 WL 3501818, at *4 (C.D. Cal. Aug. 9, 2011). In *Clinton*, the court noted that such provisions are "common in entertainment contracts to permit the accounting party to close its books at a time certain, as agreed by the parties, and not be required to attempt to investigate or deal with stale claims." *Id.* at *4 (internal quotation marks omitted) (citing *Boston Edison Co. v. F.E.R.C.*, 856 F.2d 361, 372 (1st Cir. 1988); *Breitman v. Brody*, 113 Cal. App. 2d 642, 645 (1952)).[5] The court therefore concluded that, to the extent the plaintiff had failed to make an objection or claim within the time required by the contract, his claims failed as a matter of law. *Id.*; *see also Drum Major Music Ent. Inc. v. Young Money Ent., LLC*, No. 11 Civ. 1980(LBS), 2012 WL 423350, at *2-3 (S.D.N.Y. Feb. 7, 2012) (dismissing claim for royalties pursuant to Rule 12(b)(6) "insofar as its relates to royalties for the accounting period ending [one year prior to the filing of this lawsuit] or earlier," pursuant to one year contractual limitations period).

Here, even assuming Plaintiff was not contractually barred from bringing the present claims, the relevant agreements foreclose Plaintiff from asserting a cause of action against Capitol for underpayment of royalties rendered more than three years prior to the filing of this lawsuit (i.e., before May 11, 2009). Because all of Plaintiff's claims are for the underpayment of royalties pursuant to the Original Agreement, *see* § III.C, *supra*, all of Plaintiff's claims related to royalty statements rendered more than three years before the filing of this action are barred. If the Court is otherwise prepared to let Plaintiff's claims proceed, the Court thus should dismiss each of the claims to the extent they seek recovery of royalties reported on statements rendered on or before May 11, 2009. *Drum Major*, 2012 WL 423350, at *2-3.

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[5] Analogously, California courts have upheld so-called "incontestability" provisions of insurance contracts, whereby an insurance policy is deemed valid unless the insurer has contested the policy prior to the expiration of the specified limitations period. Such provisions have been upheld even in the face of allegations of fraud by the insured. *See Amex Life Assurance Co. v. Superior Court*, 14 Cal. 4th 1231, 1238 (1997) ("Such a provision is reasonable and proper, as it gives the insured a guaranty against possible expensive litigation to defeat his claim after the lapse of many years, and at the same time gives the company time and opportunity for investigation, to ascertain whether the contract should remain in force. It is not against public policy, as tending to put fraud on a par with honesty.") (quoting *Dibble v. Reliance Life Ins. Co. of Pittsburg, PA*, 170 Cal. 199, 202 (1915)) (internal quotation marks and citations omitted). "The incontestable clauses are enforced with particularity by the courts because of the desirable purpose which they have. It is their purpose to put a checkmate upon litigation; to prevent, after the lapse of a certain period of time, an expensive resort to the courts—expensive both from the point of view of the litigants and that of the citizens of the state. In that way, it is a statute of limitations upon the right to maintain certain actions or certain defenses . . . ." *Id.* (internal citations omitted)).

C. Plaintiff's Allegations Of Fraudulent Business Practices In Violation Of Section 17200 Do Not Meet The Requirements Of Rule 9(b) And Must Be Dismissed.

As shown above, Plaintiff is precluded from bringing any claim for underpayment of royalties against Capitol. However, even if Plaintiff could assert such a claim, Plaintiff's fourth cause of action fails to plead fraud with the specificity required by Federal Rule of Civil Procedure 9(b). Plaintiff alleges that Capitol violated section 17200 of California's Unfair Competition Law ("UCL") by "engaging in the unlawful, unfair and **fraudulent** business practices." FAC, ¶ 160 (emphasis added). Where a plaintiff alleges fraud under the UCL, a complaint must satisfy Federal Rule of Civil Procedure 9(b)'s particularity requirements by pleading with particularity "the who, what, when, where, and how of the misconduct alleged." *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126–27 (9th Cir. 2009). "[A] plaintiff must set forth *more* than the neutral facts necessary to identify the transaction." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (emphasis in original). The plaintiff must specify "with particularity the time and place of the fraud, the statements made and by whom made, an explanation of why or how such statements were false or misleading when made, and the role of each defendant in the alleged fraud." *Snyder v. Ford Motor Co.*, No. C-06-0497 MMC, 2006 WL 2472187, at *2 (N.D. Cal. Aug. 24, 2006) (internal citations and quotation marks omitted).

Furthermore, where a plaintiff makes allegations of fraud against a corporation, "the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Lazar v. Superior Court*, 12 Cal. 4th 631, 645 (1996) (internal quotation marks omitted). And where, as here, multiple defendants are involved, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007); *see also Pegasus Holdings v. Veterinary Centers of America, Inc.*, 38 F. Supp. 2d

1158, 1163 (C.D. Cal. 1998) (Plaintiff "must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'"). "Where the allegations in support of a claim fail to satisfy [these] heightened pleading requirements of Rule 9(b), the claim is subject to dismissal." *Snyder*, 2006 WL 2472187, at *2.

Here, Plaintiff's claim fails to satisfy the heightened pleading requirements of Rule 9(b) applicable to her claims under the "fraudulent" prong of section 17200. Plaintiff has not alleged any fraudulent activity on the part of any specific defendant, let alone Capitol. Nor has Plaintiff identified any allegedly authorized employee of any defendant who made the purported fraudulent misrepresentations. Instead, Plaintiff has improperly lumped every defendant together and made vague allegations about misconduct, stating that defendants "engaged in a broad scheme to underpay numerous artists while engaging in a sustained public relations effort designed to convince the public otherwise." FAC, ¶ 160. Such allegations do not meet Rule 9(b)'s standard, as they do not identify with specificity the factual basis for holding each of the defendants liable. As a result, to the extent Plaintiff's fourth cause of action purports to assert a claim under the UCL's fraud prong, that claim must be dismissed. *See Rosal v. First Federal Bank of California*, 671 F. Supp. 2d 1111, 1128 (N.D. Cal. 2009) (dismissing claim for fraudulent business practices in violation of UCL due to failure to "plead with the requisite particularity the specific representations that [were] attributable to [defendant], the identity of the [defendant] employee who made the representations, their authority to speak, what they said or wrote, and when it was said or written.").

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V. CONCLUSION

Plaintiff's claims must be dismissed (1) because the plain language of both the Original Agreement and the Loan-Out Agreement bar her from asserting royalty claims as an individual, (2) because she seek royalties based on statements rendered more than three years before the filing of this lawsuit, and (3) because she has failed to allege fraud under the UCL with the requisite specificity.

Dated: July 23, 2012

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